

June 2005

MJI Publication Updates

Adoption Proceedings Benchbook

**Child Protective Proceedings Benchbook
(Revised Edition)**

**Crime Victim Rights Manual (Revised
Edition)**

**Criminal Procedure Monograph 2—
Issuance of Search Warrants (Revised
Edition)**

**Criminal Procedure Monograph 6—Pretrial
Motions (Revised Edition)**

**Juvenile Justice Benchbook (Revised
Edition)**

**Managing a Trial Under the Controlled
Substances Act**

Michigan Circuit Court Benchbook

Sexual Assault Benchbook

June 2005

Update: Adoption Proceedings Benchbook

CHAPTER 6

Formal Placement and Action on the Adoption Petition

6.5 Name Change and New Birth Certificate

D. Delayed Registration of Foreign Birth

Effective May 19, 2005, 2005 PA 22 amended MCL 333.2830 to allow the court to enter a new name for a child on the delayed registration of birth. Replace the quote of MCL 333.2830 on page 204 with the following text:

“(1) If a child whose birth occurred outside the United States, a territory of the United States, or Canada is adopted by a resident of this state under the laws of this state or under the laws of a foreign country, the probate court, on motion of the adopting parent, may file a delayed registration of birth on a form provided by the department. The delayed registration shall contain the date and place of birth and other facts specified by the department.

“(2) If the date and place of birth of a child described in subsection (1) cannot be documented from foreign records or a medical assessment of the development of the child indicates that the date of birth as stated in the immigration records is not correct, the court shall determine the facts and establish a date and place of birth and may file a delayed registration of birth as provided in subsection (1).

“(3) Upon the petition of a child adopted in this state whose birth occurred outside the United States, a territory of the United States, or Canada, or a petition of the child’s adoptive parents, the court that issued an order of adoption for that child before the effective date of this section* may issue a delayed registration of birth for the adopted child as provided in subsection (1).

*MCL 333.2830 became effective on September 30, 1978. 1978 PA 368.

“(4) A probate court may, at the request of the adopting parent when filing a delayed registration of birth under subsection (1), enter a new name for the child on the delayed registration of birth. After the filing of a delayed registration of birth that includes a change of name, the new name shall be the legal name of the adopted child.”

CHAPTER 11

Adoption Proceedings Involving an Indian Child

11.3 Proceedings to Which the Indian Child Welfare Act Applies

Before the “**Note**” near the bottom of page 293, insert the following text:

“Indian Tribe” Defined. An “Indian tribe” means “any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for services provided to Indians by the Secretary [of the Interior] because of their status as Indians[.]” 25 USC 1903(8). The court determines whether a tribe is an “Indian tribe.” *In re NEGP*, 245 Mich App 126, 133-34 (2001).

In *In re Fried*, ___ Mich App ___, ___ (2005), the respondent claimed that the trial court erred in failing to apply ICWA to the proceedings because the child was eligible for membership in the “Lost Cherokee Nation.” The Court of Appeals held that “because the tribe to which respondent belongs is not a tribe recognized as eligible for services provided to Indians by the Secretary of the Interior, it is not an ‘Indian tribe’ within the meaning of the ICWA. 25 USC 1903(8), (11).” *Fried, supra*.

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Update: Child Protective Proceedings Benchbook (Revised Edition)

CHAPTER 18

Hearings on Termination of Parental Rights

18.20 Termination on the Grounds of Failure to Rectify Conditions Following the Court's Assumption of Jurisdiction—§19b(3)(c)

Case Law

Insert the following case summary before the summary of *In re AH* on page 403:

♦ *In re Fried*, ___ Mich App ___, ___ (2005)

The trial court did not err in terminating respondent-father's parental rights to his child under §19b(3)(c)(i). Respondent's drug addiction continued to exist at the time of the hearing on termination of rights, and, although he had begun to address his addiction, evidence showed that it would take 18-24 months before respondent would overcome denial of his addiction. Moreover, if respondent successfully completed substance abuse treatment, he would then need to address "underlying personality issues." Because the earliest time that respondent would be able to care for his 14-month-old child was in two years, the trial court properly found that the conditions that led to adjudication would not be rectified in a reasonable time given the child's age.

CHAPTER 20

“Child Custody Proceedings” Involving Indian Children

20.3 Determining Whether a Child Is an “Indian Child”

On page 429 before the last paragraph, insert the following text:

“Indian tribe” defined. An “Indian tribe” means “any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for services provided to Indians by the Secretary [of the Interior] because of their status as Indians[.]” 25 USC 1903(8). The court determines whether a tribe is an “Indian tribe.” *In re NEGP*, 245 Mich App 126, 133-34 (2001).

In *In re Fried*, ___ Mich App ___, ___ (2005), the respondent claimed that the trial court erred in failing to apply ICWA to the proceedings because the child was eligible for membership in the “Lost Cherokee Nation.” The Court of Appeals held that “because the tribe to which respondent belongs is not a tribe recognized as eligible for services provided to Indians by the Secretary of the Interior, it is not an ‘Indian tribe’ within the meaning of the ICWA. 25 USC 1903(8), (11).” *Fried, supra*.

June 2005

Update: Crime Victim Rights Manual (Revised Edition)

CHAPTER 7

Victim Notification

7.14 Notification of Post-Conviction DNA Testing

On page 158, replace the last sentence of the first paragraph with the following text:

All petitions must be filed no later than January 1, 2009.*

*2005 PA 4,
effective April
1, 2005.

CHAPTER 8

The Crime Victim at Trial

8.14 Former Testimony of Unavailable Witness

C. Defendant's Right to Confront the Witnesses Against Him or Her

Insert the following text at the end of the second-to-last paragraph on page 264:

See *United States v Garcia-Meza*, ___ F3d ___, ___ (CA 6, 2005), a case involving the rule that admission of an unavailable witness' statement does not violate the Confrontation Clause if the defendant caused the witness to be unavailable.

The *Garcia-Meza* Court also rejected the defendant's assertion that forfeiture of his right to confrontation only applies when a criminal defendant kills or otherwise prevents a witness from testifying with the specific intent to prevent him or her from testifying. Although FRE 804(b)(6) (and MRE 804(b)(6)) may contain this requirement, it is not a requirement of the Confrontation Clause. *Garcia-Meza, supra* at ___.

A witness' out-of-court photo identification of the defendants during police questioning was a testimonial statement improperly admitted through the testimony of the investigating officer where the witness did not testify at trial and the defendants did not have a previous opportunity to cross-examine the absent witness. *United States v Pugh*, ___ F3d ___, ___ (CA 6, 2005).

CHAPTER 12

The Relationship Between Criminal or Juvenile Proceedings & Civil Actions Filed by Crime Victims

12.3 Statutes of Limitations for Tort Actions

Insert the following text at the bottom of page 389:

The discovery rule is applied “to avoid unjust results which could occur when a reasonable and diligent plaintiff would be denied the opportunity to bring a claim due [] to . . . the inability of the plaintiff to learn of or identify the causal connection between the injury and the breach of a duty owed by a defendant.” *Trentadue v Buckler Automatic Lawn Sprinkler Co*, ___ Mich App ___ (2005).

In *Trentadue*, the plaintiff brought claims against the defendants that, without application of the discovery rule, would have been precluded by the relevant statutes of limitation. The defendants argued that the discovery rule could not be used to extend a claim’s date of accrual until the perpetrator’s identity is established or a plaintiff has determined all the causes of action possible. The Court of Appeals agreed with the plaintiff that the discovery rule applied to mark the date of accrual as the date on which the reasonable and diligent plaintiff discovered the causal relationship between the plaintiff’s injury (the victim’s death) and the defendants’ breach of a duty owed to the victim. *Id.* at ____.

The Court distinguished the case from cases of unknown identity to which the discovery rule does not apply. In *Trentadue*, the plaintiff was aware of the injury and the cause (the plaintiff’s decedent was murdered); what the plaintiff did not know, and could not have known until the killer’s culpability was established, was that other parties, based on their relationship to the killer, harmed the victim by breaching duties owed to the victim. *Id.* at ____.

June 2005

Update: Criminal Procedure Monograph 2—Issuance of Search Warrants (Revised Edition)

Part A — Commentary

2.13 The Exclusionary Rule and Good Faith Exception

Insert the following text after the November 2004 update to page 25:

Whether an officer's reliance on a search warrant is objectively reasonable is determined by the information contained in the four corners of the affidavit; therefore, the decision whether the good-faith exception to the exclusionary rule applies to evidence seized pursuant to an invalid warrant must be made without considering any information known to an officer but not found in the affidavit. *United States v Laughton*, ___ F3d ___, ___ (CA 6, 2005).

In *Laughton*, the good-faith exception was inapplicable because the affidavit failed to establish even a remote connection between the place to be searched and the criminal conduct prompting the search. The Sixth Circuit noted that the warrant

“failed to make any connection between the residence to be searched and the facts of criminal activity that the officer set out in his affidavit. Th[e] affidavit also failed to indicate any connection between the defendant and the address given or between the defendant and any of the criminal activity that occurred there.” *Id.* at ___.

The Court further noted that

“the investigatory officer's affidavit did not indicate where the confidential informant had made ‘multiple purchases of methamphetamine.’ It did not even say explicitly that the confidential informant had purchased the narcotics from the suspect. Finally, the statement that the confidential informant had observed ‘controlled substances at or in the residence or located on the person of [the defendant]’ does not indicate where that residence was or when these observations were made, raising the

possibility that the information was stale. . . . The application simply listed the address of the premises to be searched, a summary of the deputy’s professional experience, and two acontextual allegations against [the defendant].” *Id.* at ____.
[Footnotes omitted.]

June 2005

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Part 1—General Requirements

6.8 Motions for Rehearing or Reconsideration

Insert the following text on page 8, immediately before the existing text:

A circuit court, acting as an appellate court in review of a district court order or judgment, possesses the authority to reconsider its own previous order or judgment on the matter. *People of the City of Riverview v Walters*, ___ Mich App ___, ___ (2005).

Insert the following text on page 9, immediately before Part 2:

Palpable error is not a mandatory prerequisite to a court's decision to grant a party's motion for reconsideration. *People of the City of Riverview v Walters*, ___ Mich App ___, ___ (2005). Adherence to the palpable error provision contained in MCR 2.119(F)(3) is not required; rather, the provision offers guidance to a court by suggesting when it may be appropriate to grant a party's motion for reconsideration. *Walters, supra* at ___.

Where a different judge is seated in the circuit court that issued the ruling or order for which a party seeks reconsideration, the judge reviews the prior court's factual findings for clear error. *Id.* at ___. The fact that the successor judge is reviewing the matter for the first time does not authorize the judge to conduct a de novo review. *Id.* at ___.

Part 2—Individual Motions

6.30 Motion to Suppress Eyewitness Identification at Trial Because of Illegal Pretrial Identification Procedure

2. Impermissible Suggestiveness and Due-Process Limitations

Insert the following text on page 70, before the information beginning with “3. Consequences of Violation”:

If the totality of circumstances supports the reliability of a witness’ pretrial identification and that reliability outweighs any improper suggestiveness, the pretrial identification is properly used to advance the witness’ identification of the defendant at trial. *Howard v Bouchard*, ___ F3d ___, ___ (CA 6, 2005).

In *Howard*, the witness’ pretrial identification of the defendant was not unduly suggestive even though the witness saw the defendant on two separate occasions before the witness identified the defendant in a lineup. The witness admitted seeing the defendant in the courtroom on each of two days that the defendant’s preliminary examination was scheduled, but the witness testified that he did not pay much attention to the defendant and only saw him from behind. After the preliminary examination was adjourned and rescheduled for the second time, the defendant appeared in a lineup, and the witness identified him as the man who shot and killed the victim. The Sixth Circuit concluded that the pretrial identification in this case “was only minimally suggestive.” The suggestiveness was outweighed by the reliability of the witness’ identification as determined by considering the totality of circumstances, including the factors discussed in *Neil v Biggers*, 409 US 188 (1972).

Part 2—Individual Motions

6.36 Motion to Suppress Evidence Seized Pursuant to a Defective Search Warrant

Insert the following text after the November 2004 update to page 87:

Whether an officer's reliance on a search warrant is objectively reasonable is determined by the information contained in the four corners of the affidavit; therefore, the decision whether the good-faith exception to the exclusionary rule applies to evidence seized pursuant to an invalid warrant must be made without considering any information known to an officer but not found in the affidavit. *United States v Laughton*, ___ F3d ___, ___ (CA 6, 2005).

In *Laughton*, the good-faith exception was inapplicable because the affidavit failed to establish even a remote connection between the place to be searched and the criminal conduct prompting the search. The Sixth Circuit noted that the warrant

“failed to make any connection between the residence to be searched and the facts of criminal activity that the officer set out in his affidavit. Th[e] affidavit also failed to indicate any connection between the defendant and the address given or between the defendant and any of the criminal activity that occurred there.” *Id.* at ___.

The Court further noted that

“the investigatory officer's affidavit did not indicate where the confidential informant had made ‘multiple purchases of methamphetamine.’ It did not even say explicitly that the confidential informant had purchased the narcotics from the suspect. Finally, the statement that the confidential informant had observed ‘controlled substances at or in the residence or located on the person of [the defendant]’ does not indicate where that residence was or when these observations were made, raising the possibility that the information was stale. . . . The application simply listed the address of the premises to be searched, a summary of the deputy's professional experience, and two acontextual allegations against [the defendant].” *Id.* at _____. [Footnotes omitted.]

Part 2—Individual Motions

6.37 Motion to Suppress Evidence Seized Without a Search Warrant

Insert the following text at the bottom of page 88:

Under Michigan law, a trespasser has no legitimate expectation of privacy in a dwelling house even when the trespasser lawfully occupied the premises at an earlier date. *United States v Hunyady*, ___ F3d ___, ___ (CA 6, 2005).

Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 2

Jurisdiction, Transfer, and Venue

2.17 Transfer of Jurisdiction in Status Offense and “Wayward Minor” Cases Involving Indian Children

A. Determining the Applicability of the Indian Child Welfare Act and MCR 3.980 in a Specific Case

On page 38 immediately before subsection (B), insert the following text:

An “Indian tribe” means “any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for services provided to Indians by the Secretary [of the Interior] because of their status as Indians[.]” 25 USC 1903(8). The court determines whether a tribe is an “Indian tribe.” *In re NEGP*, 245 Mich App 126, 133-34 (2001).

In *In re Fried*, ___ Mich App ___, ___ (2005), the respondent claimed that the trial court erred in failing to apply ICWA to the proceedings because the child was eligible for membership in the “Lost Cherokee Nation.” The Court of Appeals held that “because the tribe to which respondent belongs is not a tribe recognized as eligible for services provided to Indians by the Secretary of the Interior, it is not an ‘Indian tribe’ within the meaning of the ICWA. 25 USC 1903(8), (11).” *Fried, supra*.

Update: Managing a Trial Under The Controlled Substances Act

CHAPTER 15

Sentencing

15.2 Sentencing for Major Controlled Substance Offenses

B. Major Controlled Substance Offenses Requiring Minimum Prison Terms That Permit Departure for “Substantial and Compelling Reasons”

Insert the following text after the April 2003 update to page 318:

Although the ameliorative changes made to the sentencing provisions in MCL 333.7401 do not apply retrospectively, a sentencing court should consider whether it is appropriate to tailor a defendant’s sentence to reflect the Legislature’s more lenient sentencing policy. *People v Michielutti*, ___ Mich App ___, ___ (2005). In addition to any other proper factors, “the new, ameliorative legislative policy qualifies as an objective and verifiable reason to deviate from the former mandatory sentence” and may contribute to the substantial and compelling reasons for a court’s departure from a previous mandatory sentence. *Id.* at ___.

CHAPTER 15

Sentencing

15.6 “Substantial and Compelling Reasons” to Depart from Minimum Prison Terms

B. Michigan Supreme Court’s Definition of “Substantial and Compelling”

1. Objective and Verifiable Test Is Upheld

Insert the following text on page 340, immediately before sub-subsection (2):

Note: Ameliorative changes made to the sentencing provisions in MCL 333.7401 do not apply retrospectively, but a sentencing court should consider whether it is appropriate to tailor a defendant’s sentence to reflect the Legislature’s more lenient sentencing policy. *People v Michielutti*, ___ Mich App ___, ___ (2005). In addition to any other proper factors, “the new, ameliorative legislative policy qualifies as an objective and verifiable reason to deviate from the former mandatory sentence” and may contribute to the substantial and compelling reasons for a court’s departure from a previous mandatory sentence. *Id.* at ___.

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Prior Testimony.

Insert the following text before the last paragraph on page 112:

A witness' statement identifying the defendants for police is a testimonial statement under *Crawford v Washington*, 541 US 36 (2004). In *United States v Pugh*, ___ F3d ___, ___ (CA 6, 2005), the defendants were convicted of several counts relating to a bank robbery. During the trial, a police officer testified that a witness identified pictures of the defendants during the witness' interview with police. The witness never testified at trial, and it is unclear whether she was unavailable or simply absent. The United States Court of Appeals for the Sixth Circuit concluded that the statement was given during a formal police interrogation, and a reasonable person would anticipate that the statement would be used against the accused for investigation and prosecution. Therefore, the statement was testimonial in nature. Further, the statement was offered for the truth of the matter asserted – that the defendants were in fact the men in the picture.

CHAPTER 3

Civil Proceedings

Part IV—Resolution Without Trial (MCR Subchapter 2.400)

3.33 Case Evaluation

H. Rejecting Party's Liability for Costs — MCR 2.403(O)

2. Actual Costs

Add the following text to the end of the second full paragraph on page 202:

In *Haliw v City of Sterling Heights (On Remand)*, ___ Mich App ___ (2005), the Court of Appeals analyzed the “interest of justice” exception under MCR 2.403(O)(11). The Court relied upon the analysis in *Luidens v 63rd Dist Court*, 219 Mich App 24 (1996), that addressed the “interest of justice” exception for purposes of sanctions under MCR 2.405(D)(3). The Court quoted its earlier opinion in *Haliw v City of Sterling Heights*, 257 Mich App 689, 706-709 (2003). Examples where the exception may apply include where an issue of first impression is involved, where the law is unsettled and substantial damages are at issue, where significant financial disparity exists between the parties, or where third persons may be significantly affected. *Haliw, supra* at 707, quoting *Luidens, supra* at 36. “Other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception.” *Haliw, supra*, quoting *Luidens, supra*.

The trial court did not err in denying case evaluation sanctions based upon the “interest of justice” exception where the defendant’s decision to wait until after the close of proofs to move for a directed verdict based on a viable defense caused the “plaintiff and the court to expend time and resources on litigation that might have been unnecessary at the outset.” *Harbour v Correctional Medical Services, Inc*, ___ Mich App ___, ___ (2005). The trial court found that the “defendant’s actions constituted ‘gamesmanship’ that was unnecessarily costly to plaintiff, making it unjust for defendant to recover expenses it elected to create[.]” *Id.*

CHAPTER 3

Civil Proceedings

Part IV—Resolution Without Trial (MCR Subchapter 2.400)

3.33 Case Evaluation

H. Rejecting Party's Liability for Costs — MCR 2.403(O)

3. Costs Taxable in Any Civil Action—MCR 2.403(O)(6)

On page 203 immediately before sub-subsection (4), insert the following text:

In *Fansler v Richardson*, ___ Mich App ___, ___ (2005), the Court of Appeals found that a defendant is not a “prevailing party” entitled to costs from another co-defendant where the co-defendant filed a notice of nonparty fault against the defendant. In *Fansler*, the plaintiff filed a wrongful death action against IPF. IPF then filed a notice of nonparty fault pursuant to MCR 2.112(K) against the defendants Gibler and Thermogas. Summary disposition was granted in the defendants’ favor, and they sought costs from co-defendant IPF. The Court of Appeals held that defendants Gibler and Thermogas were not “prevailing parties” against co-defendant IPF under MCR 2.625. The Court reasoned that “[t]he ultimate issue of fault stemming from the resolution of the [dispute] would have benefited defendants Gibler’s and Thermogas’ position against *plaintiffs*, but not against co-defendant IPF. Therefore, because defendants Gibler and Thermogas had no vested right to recover from co-defendant IPF, they could not be considered a ‘prevailing party’ under MCR 2.625 against IPF, and they had no right to tax costs against IPF.” *Fansler, supra* at ___.

CHAPTER 3

Civil Proceedings

Part VI—Post-Judgment Proceedings (MCR Subchapter 2.600)

3.56 Costs

A. Authority

On page 243 immediately before subsection (B), insert the following text:

In *Fansler v Richardson*, ___ Mich App ___, ___ (2005), the Court of Appeals found that a defendant is not a “prevailing party” entitled to costs from another co-defendant where the co-defendant filed a notice of nonparty fault against the defendant. In *Fansler*, the plaintiff filed a wrongful death action against IPF. IPF then filed a notice of nonparty fault pursuant to MCR 2.112(K) against the defendants Gibler and Thermogas. Summary disposition was granted in the defendants’ favor, and they sought costs from co-defendant IPF. The Court of Appeals held that defendants Gibler and Thermogas were not “prevailing parties” against co-defendant IPF under MCR 2.625. The Court reasoned that “[t]he ultimate issue of fault stemming from the resolution of the [dispute] would have benefited defendants Gibler’s and Thermogas’ position against *plaintiffs*, but not against co-defendant IPF. Therefore, because defendants Gibler and Thermogas had no vested right to recover from co-defendant IPF, they could not be considered a ‘prevailing party’ under MCR 2.625 against IPF, and they had no right to tax costs against IPF.” *Fansler, supra* at ___.

CHAPTER 3

Civil Proceedings

Part VI—Post-Judgment Proceedings (MCR Subchapter 2.600)

3.58 Sanctions

D. Frivolous Claim or Defense

On page 248 after the second paragraph, insert the following text:

A trial court properly ordered sanctions against the plaintiffs and the plaintiff's attorney where the court determined that the plaintiffs "knew at the outset" of litigation that the claims were frivolous and proceeded anyway. *BJ's & Sons Const Co, Inc v Van Sickle*, ___ Mich App ___, ___ (2005).

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.8 Information

B. Amendments

Insert the following language after the second paragraph on page 291:

See also *People v Russell*, ___ Mich App ___, ___ (2005) (the defendant was not unfairly surprised or deprived of adequate time to prepare a defense against a charge when the charge added to the amended information was a charge presented at the defendant's preliminary examination and had been struck from the information in an earlier amendment).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.12 Motion to Suppress Identification of Defendant

A. Generally

Insert the following text at the bottom of page 306:

If the totality of circumstances support the reliability of a witness' pretrial identification and that reliability outweighs any improper suggestiveness, the pretrial identification is properly used to advance the witness' identification of the defendant at trial. *Howard v Bouchard*, ___ F3d ___, ___ (CA 6, 2005).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

E. Was a Warrant Required?

5. Consent

Insert the following text after the quoted paragraph at the top of page 342:

Where the traffic stop and resulting detention were reasonable, no Fourth Amendment violation occurred and no inquiry was needed as to whether the officer effecting the stop “had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics.” Consequently, the defendant’s consent to search his vehicle under the circumstances was valid and the evidence obtained was properly admitted against the defendant at trial. *People v Williams*, 472 Mich 308, 310 (2005).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

G. Is Exclusion the Remedy if a Violation Is Found?

1. Good-Faith Exception

Insert the following text after the March 2005 update to page 348:

Whether an officer's reliance on a search warrant is objectively reasonable is determined by the information contained in the four corners of the affidavit; therefore, the decision whether the good-faith exception to the exclusionary rule applies to evidence seized pursuant to an invalid warrant must be made without considering any information known to an officer but not found in the affidavit. *United States v Laughton*, ___ F3d ___, ___ (CA 6, 2005).

In *Laughton*, the good-faith exception was inapplicable because the affidavit failed to establish even a remote connection between the place to be searched and the criminal conduct prompting the search. The Sixth Circuit noted that the warrant

“failed to make any connection between the residence to be searched and the facts of criminal activity that the officer set out in his affidavit. Th[e] affidavit also failed to indicate any connection between the defendant and the address given or between the defendant and any of the criminal activity that occurred there.” *Id.* at ___.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.22 Automobile Searches

C. Probable Cause to Search an Automobile

Insert the following case summary after the March 2005 update to page 350:

Under the circumstances presented in *People v Williams*, 472 Mich 308 (2005), no probable cause was necessary to justify the officer's questions and because the detention was reasonable, the defendant's consent to the search of the vehicle was valid. Where the traffic stop and resulting detention are reasonable, no Fourth Amendment violation occurs and no inquiry is needed as to whether the officer effecting the stop "had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics." *Id.* at 318.

The Court explained that a law enforcement officer is permitted to detain a driver stopped for a traffic violation in order to question the driver about the driver's destination and travel plans. The officer's authority to ask questions extends to follow-up questions prompted by a driver's suspicious or implausible answers to questions posed by the officer. *Id.* at 316.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.23 Dwelling Searches

B. Standing

Insert the following case summary on page 353, immediately before subsection (C):

Under Michigan law, a trespasser has no legitimate expectation of privacy in a dwelling house even when the trespasser lawfully occupied the premises at an earlier date. *United States v Hunyady*, ___ F3d ___, ___ (CA 6, 2005).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.24 Investigatory Stops

B. Traffic Stop

Insert the following case summary on page 356, immediately before subsection (C):

Where the initial traffic stop is justified and the officer's questions do not exceed the scope of the stop and do not unreasonably extend the time of the detention, a defendant's consent to search the vehicle is valid. *People v Williams*, 472 Mich 308, 310 (2005). Under those circumstances, no Fourth Amendment violation occurs and no inquiry is needed as to whether the officer effecting the stop "had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics." *Id.* at 318.

In *Williams*, the defendant was stopped by a Michigan State Police trooper for speeding. After the defendant produced his driver's license, the trooper asked where he and his two passengers were going. The defendant's answer raised the trooper's suspicion because it was implausible. Answers the defendant and the two passengers gave to the trooper were inconsistent and served only to increase his suspicions. At one point during the encounter, the defendant admitted to a previous arrest "for a marijuana-related offense." Following the five- to eight-minute detention, the trooper asked for and received the defendant's consent to search the vehicle. A canine unit arrived within three minutes, and the dog indicated that narcotics were present in the vehicle's backseat. No drugs were found there, and the defendant consented to a search of the vehicle's trunk. When the defendant later withdrew his consent, the trooper obtained a warrant, searched the trunk, and discovered marijuana and cocaine. *Id.* at 310–312.

The *Williams* Court conducted "a fact-intensive inquiry" pursuant to the standards set forth in *Terry v Ohio*, 392 US 1 (1968). According to the *Terry* standard,

"the reasonableness of a search or seizure depends on 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Williams, supra* at 314.
[Internal citations and footnotes omitted.]

The Court explained that a law enforcement officer is permitted to detain a driver stopped for a traffic violation in order to question the driver about the driver's destination and travel plans. The officer's authority to ask questions extends to follow-up questions prompted by a driver's suspicious or implausible answers to questions posed by the officer. *Id.* at 316.

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.30 Witnesses—Disclosure and Production

A. Res Gestae Witnesses List with Information

Replace the second paragraph beginning at the bottom of page 380 with the following text:

A prosecutor is not statutorily obligated to locate, endorse, and produce unknown witnesses who might be res gestae witnesses; a prosecutor does have a statutory duty to give notice of any known witnesses and provide reasonable assistance to locate a witness when requested by a defendant. *People v Cook*, ___ Mich App ___, ___ (2005), citing *People v Burwick*, 450 Mich 281, 289 (1995). The Court elaborated:

“Because [*People v*] *Pearson*[, 404 Mich 698 (1979)] mandated hearings for the prosecution’s breach of a duty that MCL 767.40a abolished, we hold, in answer to the question posed to us by our Supreme Court, that *Pearson* is no longer good law.⁶ We further hold that an evidentiary hearing is no longer *required* simply because the prosecution did not produce a res gestae witness.

⁶ We note that there may be times when such a hearing may be appropriate. For example, MCL 767.40a(5) does require the prosecution to provide reasonable assistance in locating witnesses whose presence defendant specifically requests. A hearing of the type described by our Supreme Court in *Pearson* might be appropriate if the prosecution is found to have breached this duty.”

Cook, *supra* at ___.

4.30 Witnesses—Disclosure and Production

D. Locating and Producing Witnesses

Replace the second full paragraph on page 382 with the following text:

A prosecutor is not statutorily obligated to locate, endorse, and produce unknown witnesses who might be *res gestae* witnesses; a prosecutor does have a statutory duty to give notice of any known witnesses and provide reasonable assistance to locate a witness when requested by a defendant. *People v Cook*, ___ Mich App ___, ___ (2005), citing *People v Burwick*, 450 Mich 281, 289 (1995).

E. Evidentiary Hearing

Replace the text on pages 382–383 with the following:

A prosecutor is not statutorily obligated to locate, endorse, and produce unknown witnesses who might be *res gestae* witnesses; a prosecutor does have a statutory duty to give notice of any known witnesses and provide reasonable assistance to locate a witness when requested by a defendant. *People v Cook*, ___ Mich App ___, ___ (2005), citing *People v Burwick*, 450 Mich 281, 289 (1995). The Court elaborated:

“Because [*People v*] *Pearson*[, 404 Mich 698 (1979)] mandated hearings for the prosecution’s breach of a duty that MCL 767.40a abolished, we hold, in answer to the question posed to us by our Supreme Court, that *Pearson* is no longer good law.⁶ We further hold that an evidentiary hearing is no longer *required* simply because the prosecution did not produce a *res gestae* witness.

⁶ We note that there may be times when such a hearing may be appropriate. For example, MCL 767.40a(5) does require the prosecution to provide reasonable assistance in locating witnesses whose presence defendant specifically requests. A hearing of the type described by our Supreme Court in *Pearson* might be appropriate if the prosecution is found to have breached this duty.”

Cook, *supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

Insert the following text after the first full paragraph on page 450:

Although the ameliorative changes made to the sentencing provisions in MCL 333.7401 do not apply retrospectively, a sentencing court should consider whether it is appropriate to tailor a defendant's sentence to reflect the Legislature's more lenient sentencing policy. *People v Michielutti*, ___ Mich App ___, ___ (2005). In addition to any other proper factors, "the new, ameliorative legislative policy qualifies as an objective and verifiable reason to deviate from the former mandatory sentence" and may contribute to the substantial and compelling reasons for a court's departure from a previous mandatory sentence. *Id.* at ___.

D. Imposition of Sentence

Insert the following text at the bottom of page 450:

When a defendant presents (at his or her sentencing hearing) objective and verifiable factors in support of a downward sentence departure, the court must address on the record all applicable factors raised and indicate whether any of the factors influenced the court's ultimate sentencing decision. *People v Michielutti*, ___ Mich App ___, ___ (2005). According to the *Michielutti* Court, "the seriousness of imposing a mandatory ten-year sentence compels some measure of reasonable disclosure[.]" *Id.* at ___, citing *People v Triplett*, 432 Mich 568, 572–573 (1989).

CHAPTER 5

Appeals & Opinions

Part I—Rules Governing Appeals to Circuit Court (MCR Subchapter 7.100)

5.1 District Court

C. Motions for Rehearing or Reconsideration

On page 483, insert a new subsection (C) containing the following text:

A circuit court, acting as an appellate court in review of a district court order or judgment, possesses the authority to reconsider its own previous order or judgment on the matter. *People of the City of Riverview v Walters*, ___ Mich App ___, ___ (2005).

Palpable error is not a mandatory prerequisite to a court's decision to grant a party's motion for reconsideration. *Id.* at ___. Adherence to the palpable error provision contained in MCR 2.119(F)(3) is not required; rather, the provision offers guidance to a court by suggesting when it may be appropriate to grant a party's motion for reconsideration. *Walters, supra* at ___.

Where a different judge is seated in the circuit court that issued the ruling or order for which a party seeks reconsideration, the judge reviews the prior court's factual findings for clear error. *Id.* at ___. The fact that the successor judge is reviewing the matter for the first time does not authorize the judge to conduct a de novo review. *Id.* at ___.

CHAPTER 5

Appeals & Opinions

Part II—Tools for Deciding Appeals to Circuit Court

5.9 Law of the Case

B. Law of the Case

Insert the following text after the second paragraph on page 500:

The law of the case doctrine does not apply to trial courts; a trial court possessed unrestricted discretion in reviewing prior decisions made by the court. *Prentis Family Foundation v Karmanos Cancer Institute*, ___ Mich App ___, ___ (2005).

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.3 “Contact” Offenses

B. Criminal Sexual Conduct—Fourth Degree

Insert the following new sub-subsection before Section 2.4 on page 43:

6. Pertinent Case Law

In *People v Russell*, ___ Mich App ___, ___ (2005), the Court of Appeals upheld the constitutionality of the CSC IV statute. In *Russell*, the defendant argued that MCL 750.520e(1)(d) is “unconstitutionally vague because it ‘appears to absolutely preclude any sexual contact between . . . two consenting adults related by marriage only.’” The Court of Appeals rejected the defendant’s argument, finding that the term “affinity” is not unconstitutionally vague, and that the statute does not give “the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed” because “sexual contact” is clearly defined.

CHAPTER 3

Other Related Offenses

3.16 Indecent Exposure

D. Pertinent Case Law

Insert the following new sub-subsection after the June 2003 update to page 162:

6. Indecent Act Televised

In *People v Huffman*, ___ Mich App ___, ___ (2005), the defendant produced a television show with a three-minute segment showing a penis and testicles marked with facial features. A voice-over provided “purportedly humorous commentary as if on behalf of the character.” *Id.* The defendant was charged with and convicted of indecent exposure. On appeal, the defendant argued that MCL 750.335a cannot be properly construed to apply to televised images. The Court of Appeals upheld the conviction, concluding that the purposes of the indecent exposure statute are “fulfilled by focusing on the impact that offensive conduct might have on persons subject to an exposure.” *Huffman, supra*. The Court found that a televised exposure could be more shocking than a physical exposure because the persons subjected to it are in private homes. Furthermore, the defendant’s exposure on television was more likely a close up and lasted longer than a physical exposure. *Id.*

The court also concluded that defendant’s right to free speech was not violated by his conviction of indecent exposure. *Id.*, relying on *United States v O’Brien*, 391 US 367 (1968), *Barnes v Glen Theatre, Inc.*, 501 US 560 (1991), and *City of Erie v Pap’s AM*, 529 US 277 (2000).

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text after the May 2005 update to page 364:

A witness' statement identifying the defendants for police is a testimonial statement under *Crawford v Washington*, 541 US 36 (2004). In *United States v Pugh*, ___ F3d ___, ___ (CA 6, 2005), the defendants were convicted of several counts relating to a bank robbery. During the trial, a police officer testified that a witness identified pictures of the defendants during the witness' interview with police. The witness never testified at trial, and it is unclear whether she was unavailable or simply absent. The United States Court of Appeals for the Sixth Circuit concluded that the statement was given during a formal police interrogation, and a reasonable person would anticipate that the statement would be used against the accused for investigation and prosecution. Therefore, the statement was testimonial in nature. Further, the statement was offered for the truth of the matter asserted – that the defendants were in fact the men in the picture.

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text after the October 2004 update to page 364:

*See the October 2004 update to page 364 for a detailed discussion of this case.

The prosecutor appealed the Court of Appeals decision in *People v Shepherd*, 263 Mich App 665 (2004),* and the Michigan Supreme Court reversed the Court of Appeals and reinstated the defendant's perjury conviction. *People v Shepherd*, ___ Mich ___, ___ (2005). The Court found the alleged constitutional error was harmless beyond a reasonable doubt because there was "overwhelming evidence of the falsity of defendant's testimony in the fleeing and eluding trial, . . . [and] it is clear beyond a reasonable doubt that a reasonable jury would have found defendant guilty of perjury even if the transcript of Butters's plea to the charge of subornation of perjury had not been admitted." Because the Court determined that the error was harmless, the Court found that it was "not necessary to address whether the admission of the transcript violated the Confrontation Clause of the United States Constitution, US Const, Am VI" *Shepherd, supra* at ___ n 4.

CHAPTER 10

Other Remedies for Victims of Sexual Assault

10.3 Defenses to Civil Actions

A. Statutes of Limitations for Civil Actions

2. Commencement of Limitations Period and the “Discovery Rule”

Insert the following text immediately before sub-subsection (3) on page 486:

The discovery rule is applied “to avoid unjust results which could occur when a reasonable and diligent plaintiff would be denied the opportunity to bring a claim due [] to . . . the inability of the plaintiff to learn of or identify the causal connection between the injury and the breach of a duty owed by a defendant.” *Trentadue v Buckler Automatic Lawn Sprinkler Co*, ____ Mich App ____ (2005).

In *Trentadue*, the plaintiff brought claims against the defendants that, without application of the discovery rule, would have been precluded by the relevant statutes of limitation. The defendants argued that the discovery rule could not be used to extend a claim’s date of accrual until the perpetrator’s identity is established or a plaintiff has determined all the causes of action possible. The Court of Appeals agreed with the plaintiff that the discovery rule applied to mark the date of accrual as the date on which the reasonable and diligent plaintiff discovered the causal relationship between the plaintiff’s injury (the victim’s death) and the defendants’ breach of a duty owed to the victim. *Id.* at ____.

The Court distinguished the case from cases of unknown identity to which the discovery rule does not apply. In *Trentadue*, the plaintiff was aware of the injury and the cause (the plaintiff’s decedent was murdered); what the plaintiff did not know, and could not have known until the killer’s culpability was established, was that other parties, based on their relationship to the killer, harmed the victim by breaching duties owed to the victim. *Id.* at ____.